

Not for Publication

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

UNITED STATES OF AMERICA

Plaintiff,

v.

DONALD BERNARD SR.,

Defendant.

Crim. No. 14-710

OPINION AND ORDER

John Michael Vazquez, U.S.D.J.

On November 12, 2020, the Court issued an Opinion and Order which denied Defendant's motion to modify his sentence and for immediate release. D.E. 67 ("Prior Opinion" or "Prior Op."), 68. Defendant again moves for immediate release, D.E. 69, 70, 71, which the Court treats as a motion for reconsideration. The Government filed opposition, D.E. 73, to which Defendant replied, D.E. 74. The Court reviewed the parties' submissions and considered the motion without oral argument pursuant to Local Criminal Rule 1.1 and Local Civil Rule 78.1(b). For the following reasons, the Court reconsiders its Prior Opinion but denies Defendant's motion to modify his sentence and for immediate release.

In the Prior Opinion, the Court detailed the relevant background and applicable legal standard, which the Court incorporates by reference here. Prior Op. at 1-9. Defendant now indicates that the institution in which he is housed, FCI Schuylkill in Pennsylvania, has experienced an outbreak of COVID-19 cases. Defendant also indicates that he learned on December 2020 (although the Government indicates that it was January 2021) that he had contracted COVID-19. Fortunately, he did not require hospitalization and has now recovered.

In its Prior Opinion, the Court found that Defendant had not shown extraordinary and compelling reasons under 18 U.S.C. § 3582(c)(1)(A) because, in part, FCI Schuylkill had not suffered any serious outbreak of positive cases. Prior Op. at 12. The subsequent outbreak, along with Defendant's positive test, present new information that clearly was not available to Defendant when he made his initial motion; these new facts are a sufficient basis for the Court to reconsider its Prior Opinion.

Nevertheless, the Court denies Defendant's motion for release for several reasons. First, Plaintiff had COVID-19 and, fortunately, has recovered. Reinfection is rare. Centers for Disease Control and Prevention, *Reinfection with COVID-19* (Oct. 27, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/your-health/reinfection.html>. More recent information from the CDC indicates that while chances of reinfection may increase over time (due to waning immunity and possible exposure to virus variants), reports of reinfection are still "infrequent." Centers for Disease Control and Prevention, *Reinfection with COVID-19* (last updated Feb. 13, 2021) [https://www.cdc.gov/coronavirus/2019-ncov/Interim Guidance on Duration of Isolation and Precautions for Adults with COVID-19.html](https://www.cdc.gov/coronavirus/2019-ncov/Interim%20Guidance%20on%20Duration%20of%20Isolation%20and%20Precautions%20for%20Adults%20with%20COVID-19.html).

Second, Defendant was offered the vaccine but declined. Such a decision demonstrates that he has voluntarily foregone an opportunity for self-care offered by the BOP. *See, e.g., United States v. Baeza-Vargas*, No. Cr-10-00448, 2021 WL 1250349, at *2-3 (D. Ariz. Apr. 5, 2021) (listing more than a dozen decisions reaching the same result).; *see also United States v. Jackson*, No. 07-40-2, 2021 WL 1145903, at *2 (E.D. Pa. Mar. 25, 2021); *United States v. Jackson*, No. 15-cr-260(7), 2021 WL 806366, at *1-2 (D. Minn. Mar. 3, 2021).

Third, while FCI Schuylkill did experience a spike in cases for a period, the facility has again stabilized. As of June 10, 2021, FCI Schuylkill has no positive case while 536 inmates and

73 staff have recovered. *COVID-19 Cases*, Bureau of Prisons, <https://www.bop.gov/coronavirus/index.jsp>. (last accessed June 10, 2021). The BOP's COVID-19 vaccine implementation plan has administered 190,150 doses as of June 10, 2021. *Id.*

Finally, the Court's analysis in its Prior Opinion as to the seriousness of the offense as well as the time remaining on Defendant's sentence also countenance against granting Defendant's motion. Prior Op. at 10-11.

For the foregoing reasons, and for good cause shown,

It is on this 10th day of June 2021 hereby,

ORDERED that Defendant's motion for reconsideration D.E. 69, 70, 71, is **Granted in part and Denied in part**; and it is further

ORDERED that the Court reconsiders its Prior Opinion due to changed circumstances; and it is further

ORDERED that Defendant's underlying motion to modify his sentence and for immediate compassionate release is **Denied**, and it is further

ORDERED that the Clerk's Office shall mail a copy of this Opinion and Order to Defendant by regular mail.


John Michael Vazquez, U.S.D.J.